

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Estate of Winifred H. Kinney, De-
ceased, by Sherwood Kinney and R.
C. Gortner, Executors,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

R. C. GORTNER,

705 N. Maple Drive, Beverly Hills, Calif.,

*Attorney for Sherwood Kinney, Executor of the Estate
of Winifred H. Kinney, deceased.*

HAROLD J. CASHIN,

404 Higgins Building, Los Angeles, Calif.,

*Attorney for Helen Kinney Gerety, Administratrix with
Will Annexed of the Estate of Winifred H. Kinney,
deceased.*

TOPICAL INDEX.

	PAGE
A.	
The Question	3
B.	
Statement of the Evidence.....	4
C.	
Statutes and Regulations Involved.....	6
D.	
Assignment of Errors Relied Upon.....	7
E.	
Argument	8
I.	
Did the trust instrument create a vested interest in the corpus in Winifred H. Kinney?.....	8
II.	
Even if Winifred H. Kinney left a taxable share, it was ex- cessively taxed by the commissioner.....	11

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Blake, Estate of, 157 Cal. 448, 108 Pac. 287.....	9
Purdy v. Buffums, 95 Cal. App. 299.....	10

STATUTES.

California Civil Code, Sec. 1636.....	9
California Civil Code, Secs. 1638, 1639.....	9
California Civil Code, Sec. 1641.....	10
California Code of Civil Procedure, Sec. 1658.....	10
Reg. 70, Art. 13.....	6, 13
Revenue Act of 1926, Sec. 302.....	6

TEXT BOOKS AND ENCYCLOPEDIAS.

6 California Jurisprudence 259.....	10
26 California Jurisprudence, 1014.....	9

No. 7639.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Estate of Winifred H. Kinney, De-
ceased, by Sherwood Kinney and R.
C. Gortner, Executors,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

A.

THE QUESTION.

The question before the Court is, first, whether deceased's estate had any taxable interest in property held under a declaration of trust executed by her predeceased husband, which had not terminated at her death, and which trust specifically provided that the *corpus* would not vest until the termination of the trust. Second, if deceased's estate did have such a taxable interest, was the method adopted by the Commissioner for determining the value of that interest proper, that is, basing it on the book value of the shares so held in trust, although the trust would not terminate for a full five years after the death of deceased.

B.

STATEMENT OF THE EVIDENCE.

This is a petition for review of the decision of the Board of Tax Appeals approving a deficiency in estate tax of the Estate of Winifred H. Kinney, deceased, in the sum of \$3968.07.

The deficiency was the amount of the tax on a one-ninth interest in a trust fund, at the valuation determined by the Commissioner. The petitioners dispute both the amount of the tax, and the ownership by the estate of any taxable interest in the trust fund.

The facts are briefly as follows:

Winifred H. Kinney died December 6th, 1927. She was the wife of Abbot Kinney, who predeceased her and died in November 1920. Abbot Kinney, in the year 1918, created a trust by declaration, a copy of which appears in full in the Transcript, page 21 *et seq.* In brief, it declared that he held the legal title to all except three shares of stock of Abbot Kinney Company, a corporation. As trustee he had the power to manage the same, and receive the rents and profits and pay them "for the support and maintenance of" certain members of his family, to wit: One-sixth to each of four children by a former marriage, and the balance "to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbot Kinney, to wit: Helen Kinney and Clan Kinney, to be controlled and applied by said Winifred H. Kinney, one-third ($\frac{1}{3}$);" etc.

During his lifetime he retained the right to act as sole trustee, to revoke the trust, and to use half the rents and

profits for his own purposes. In case of his death, the vacancy was to be filled by four of the named beneficiaries. [Tr. p. 22.]

It further provided that the trust should terminate 12 years after the death of Abbot Kinney [Tr. p. 22], and that upon the termination "the title to the whole of said property, so held in trust, *shall immediately vest* in the above named beneficiaries by title absolute, in the same proportion above named for rents and profits and the said one-third ($\frac{1}{3}$) above set forth for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney, *will pass to them* in equal shares by absolute title."

Winifred H. Kinney joined in the Trust, declaring the property was the sole and separate property of Abbot Kinney, and renounced "all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney."

The matter was submitted to the Board of Tax Appeals on an agreed statement of facts [Tr. p. 19].

The executors of Winifred H. Kinney's estate (one of whom has since resigned and been succeeded by an administratrix with the will annexed) contended that the deceased had no vested interest in the *corpus* of this fund at the time of her death. The Commissioner contended she had such interest, to wit: a vested interest in $\frac{1}{9}$ th of the *corpus*, and levied the deficiency tax of \$3968.07, basing the tax on one-ninth of the full book value of the stock. This was done in spite of the fact that the trust had not terminated in 1927 when Winifred H. Kinney died, and could not terminate until 1932.

C.

STATUTES AND REGULATIONS INVOLVED.

Revenue Act of 1926, Sec. 302:

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death; * * *

Reg. 70, Art. 13:

“General.—The value of all property includable in the gross estate is the fair market value thereof at the time of the decedent’s death. The fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the decedent’s death, and it is shown that the selling price reflects the fair market value thereof as of the date of decedent’s death, the selling price will be accepted. Neither depreciation nor appreciation in value subsequent to the date of decedent’s death will be considered. All relevant facts and elements of value should be considered in every case.

* * *

“Stock in a close corporation should be valued upon the basis of the company’s net worth, earning and dividend-paying capacity, and all other factors having a bearing upon the value of the stock. Complete financial and other data upon which the estate basis its valuation should be submitted in duplicate with the return.

“Where as to any particular security conditions of sale or ownership are such that the fair market value, determined as already indicated, would not afford a proper basis for valuation, the Commissioner, on final audit, will establish the value by considering all relevant factors.”

D.

ASSIGNMENT OF ERRORS RELIED UPON.

First: That the said United States Board of Tax Appeals erred in deciding that, at the date of her death, the deceased, Winifred H. Kinney, had a vested interest in the *corpus* of a certain trust made by Abbot Kinney in his lifetime.

Second: The United States Board of Tax Appeals erred in deciding that the trust agreement created an executed trust which gave to the beneficiaries not only the income from the trust estate during its life, but a vested interest as remaindermen in the *corpus* which became absolute at its termination.

Third: That the United States Board of Tax Appeals erred in approving the fixing of the value of decedent's interest in the trust as the agreed net worth of the Abbot Kinney Company's assets on the date of death and dividing it by nine.

Fourth: That the United States Board of Tax Appeals erred in holding that the sale of interests in the trust two years and six months after the decedent's death was too remote in point of time to serve as a guide in determining values on the basic date.

Fifth: That the United States Board of Tax Appeals erred in disregarding said sale in the fixing of the value of decedent's alleged interest.

Sixth: That the United States Board of Tax Appeals erred in disregarding the testimony of certain bank officials which was stipulated to, as to the value of decedent's interest in the trust estate.

E.

ARGUMENT.

There are two principal questions involved, the first arising out of the first two Assignments of Error, and the second out of the remaining assignments.

I.

Did the Trust Instrument Create a Vested Interest in the Corpus in Winifred H. Kinney?

It is to be noticed at the outset that in the trust instrument Winifred H. Kinney renounced all claims to the property as community property, or otherwise. The trustor covenanted that he held the legal title for certain *uses and purposes*—not for certain *persons*. These purposes were to apply the rents and profits to the *support and maintenance* of seven named individuals, in certain fractions.

Obviously these persons could be supported and maintained only up to the date of their respective deaths, and the benefit would cease upon their death.

Upon the termination of the trust at the end of twelve years after trustor's death, it provides that title "*shall immediately vest*" in the before-named beneficiaries by title absolute [Tr. p. 22), and the one-third for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney "*will pass*" to them in equal shares. [Tr. p. 23.]

There are no words of present grant anywhere in the instrument. There are *no granting* words at all, except those quoted in the last paragraph. It is apparent, therefore, that the trustor did not intend the *corpus* to vest at all until the termination of the trust. The words "shall . . . vest" and "will pass" leave no room for doubt. They follow in the same sentence which begins: "Upon the termination of the trust . . .", and obviously refer to the future. Otherwise, they can have no meaning at all.

The intention of the trustor is the determining factor in the construction of such a document.

26 *Cal. Jur.* 1014; *Estate of Blake*, 157 *Cal.* 448, 458, 108 *Pac.* 287; *Cal. Civil Code*, Sec. 1636.

Logically, and according to well established rules of construction, that intention is to be established principally from the words of the instrument itself.

Cal. Civil Code, Secs. 1638, 1639.

The Board of Tax Appeals in its decision attempts to construe the instrument from its "four corners." [Tr. p. 58.] However, it overlooks that cardinal rule of construc-

tion that every part, and *every word*, is to be given effect, if such construction is practicable.

Cal. Civil Code, Sec. 1641; *Cal. Code of Civil Proc.*, Sec. 1658; 6 *Cal. Jur.* 259; *Purdy v. Buffums*, 95 *Cal. App.* 299, 303.

The Board of Tax Appeals held that a vested remainder in the *corpus* was given to the various beneficiaries. [Tr. pp. 58-59.] The authorities cited in the decision [Tr. p. 59] do not sustain such a theory under the present facts. In any event, it is certain that a claimant for a share of the *corpus* could not base his claim for a share of this trust on such a loose "four-corner" construction, for there is not a single granting word in the instrument excepting those providing for vesting upon the termination. Whatever may be the rule in other cases is unimportant under the particular facts here.

If a claim for a share of the *corpus* could not be substantiated, it is obvious there is nothing to tax.

It is unnecessary to determine in this proceeding whether the portion of the trust property in question reverted to the estate of the trustor, Abbot Kinney, or what disposition was made of it, for the estate tax in the Winifred H. Kinney estate could only attach upon the theory that title in the *corpus* vested during her lifetime. Nor does the fact that she attempted to dispose of any interest she might have under the trust instrument in her will make any difference, for she had definitely *renounced* all interest, and could create none by such a provision in her will.

II.

**Even if Winifred H. Kinney Left a Taxable Share,
It Was Excessively Taxed by the Commissioner.**

If petitioner's contention on the first point made be incorrect, and it should be held that Winifred H. Kinney left a vested interest in one-ninth of the estate (which, of course, we do not concede), nevertheless, the tax was improperly assessed.

The Commissioner based the tax on the value of the entire capital stock as reflected by the net worth of the company's assets at the date of death of Winifred H. Kinney. The amount of such net worth was stipulated to. [Tr. p. 27.]

In 1927, at Winifred H. Kinney's death, the right to rents and profits ceased. There remained no right to vote the stock, or exercise any act of ownership over it. Unquestionably the "vested remainder" of the Winifred H. Kinney estate—assuming it owned such a remainder—which was definitely tied up for 5 years, did not have the identical value of stock free from such restrictions.

Could a rational person suggest that such an interest might be sold by the executors for the proportionate value of the corporation's assets, where the purchaser would have to wait 5 years before he could enjoy any benefit from his investment?

The Court has judicial notice of the nationwide depression which started in 1929—halfway through the period from the death of Winifred H. Kinney and the time when the stock would become free of the trust. With this in

mind, is it reasonable to believe this “vested remainder”—an interest in stock which could not become absolute until 1932—was reasonably worth the proportionate value of the corporation’s assets in 1927, when it was quite likely the corporation would be in receivership or bankruptcy before the interest became absolute?

The executors contended the value was, at most, not over 50 per cent of the free pro rata value of one-ninth of the company’s assets. This was supported by the testimony of C. C. Hogan, Trust Officer of Security-First National Bank of Los Angeles, W. D. Newcomb, Jr., President of First National Bank of Venice, and Herbert Hertel, Manager of Security-First National Bank, Venice Branch. This testimony was received under stipulation of facts that these men would so testify, if called as witnesses. The first estimated the value as 50 per cent of the pro rata value, the second as 25 per cent., and the third as $33\frac{1}{3}$ per cent. No question was raised as to the competency of this testimony, or the qualification of these witnesses. [Tr. p. 28.]

There were no sales of stock. There were, however, certain sales of beneficial interests, evidence of which was introduced. They showed a valuation of \$133,000.00 for a $\frac{1}{6}$ th interest, on which basis a one-ninth interest would have had a value of \$88,666.67. These sales were stipulated to [Tr. p. 27] and the agreements were introduced in evidence [Tr. p. 29 *et seq.*].

While these sales were made two years after Winifred H. Kinney’s death, they were made during the period before the vesting became absolute. Being the only sales, they were entitled to some weight. The balance sheet of the corporation near the date of these sales was also

introduced and stipulated to [Tr. p. 27] which gave a fair basis for comparison.

The Board of Tax Appeals passed lightly over all of this testimony as to value, terming the bankers' testimony "vague opinions", which are "not evidence." There being no sales, other than those in evidence, what other evidence could there be than opinions of those familiar with such transactions?

No testimony was offered by the Commissioner other than the net worth, as shown by the balance sheet. By Article 13, Regulations 70, (*supra*) the valuation of the stock of a close corporation should not only be upon the company's net worth, but its earning and dividend paying capacity, and all other factors having a bearing on the value of the stock. Certainly the impounding of this stock in a trust is a factor having a bearing on its value. No testimony was offered by the Commissioner on this phase, and the testimony was therefore undisputed that such interest was worth not over 50 per cent of the fractional net worth.

Petitioners believe that the order of the Board of Tax Appeals should be reversed.

Respectfully submitted,

R. C. GORTNER,

*Attorney for Sherwood Kinney, Executor of the Estate
of Winifred H. Kinney, deceased.*

HAROLD J. CASHIN,

*Attorney for Helen Kinney Gerety, Administratrix with
Will Annexed of the Estate of Winifred H. Kinney,
deceased.*

